

The Diciotti Affair: beyond the Populist Farce

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The facts

Since June, the “closed ports” policy of the new Italian government has repeatedly raised tensions with Europe and with the law. Soon after the conclusion of a second [Aquarius case](#), closed with the landing in Malta of the 141 migrants saved by an NGO ship and the agreement to distribute them in five Member States (France, Spain, Germany, Portugal and Luxembourg), another contentious case erupted. In the night between 15 and 16 August, two patrol vessels of the Italian Coast Guard rescued 190 migrants in the Maltese SAR area and transferred them on the *Diciotti*, an Italian military ship. The Italian government has already made clear that its ports are closed to any ONG ships. But what if the migrants are rescued by an Italian ship operating under the EU's Sophia mission?

In July, a similar dispute, again involving the *Diciotti*, ended up with the intervention of the President of the Republic Mattarella, who persuaded the Prime Minister Conte to open the port of Trapani and disembark the 67 migrants rescued four days before. This time, however, the Interior Minister Salvini, leader of the far-right League party, immediately declared that he would not accept any interference from the President of the Republic, and threatened to bring the migrants back to Libya if other Member State would not share the burden.

As a result, 177 migrants remained stranded on the *Diciotti* for seven to ten days. After five days spent in stand-by off Lampedusa, the Minister of Infrastructures and Transport Toninelli, on which the Italian Coast Guard depends, allowed the ship to dock in the port of Catania. Mr Salvini, though, promptly announced that no one could land until the EU found a solution. Two days later the disembarkation ban was lifted for 27 unaccompanied minors, whereas 150 migrants had to wait three more days. On 25 August – after a failed attempt of the Commission to promote another voluntary distribution of incoming migrants – the Italian government authorized the disembarkation and announced that 100 migrants would be hosted (on Italian soil) by the Catholic Church, 20 by Ireland and 20 by Albania, a non-EU State. Can this be considered a happy ending?

The (misleading) criminal investigation

“Any limitation of personal freedom must come to terms with the rules and regulations of the European Convention on Human Rights, the Constitution, the Penal Code and the Code of Criminal Procedure. You cannot escape”. With these words, on 25 August, the Prosecutor of Agrigento registered Mr Salvini and the head of his ministerial cabinet as suspects for three alleged offenses: kidnapping, illegal arrest and abuse of office. Few days later, two offences were added to the list: kidnapping for the purpose of compulsion, as Mr Salvini would have prevented the landing to obtain from the EU the redistribution of migrants; and the omission of official acts, since the Ministry indicated the port of Catania only for a “technical stopover”, thus neglecting the Coast Guard’s request for a safe haven.

Whatever the merit of these allegations, which would imply a cumulative period of 30 years of incarceration, there is little chance that it will be ever examined before a criminal court. Ministers, in fact, can be subjected to ordinary jurisdiction for crimes committed in the exercise of their functions only if two conditions, set by constitutional provisions, are satisfied: that a special court, composed of six judges chosen by drawing lots, does not dismiss the case for the inconsistency of the charges; and that the competent parliamentary chamber gives the authorization to proceed.

In the meantime, the launch of this bold investigation has already produced two results. First, it offered Mr Salvini a unmissable opportunity to stand up as a martyr in his Hobbesian struggle to defend the Italian borders: in his words, the prosecutor’s charges are “medals”. Second, it reopened, after the golden times of Silvio Berlusconi, a new chapter in the conflict between politics and the judiciary. At least this confirms that the Italian judiciary remains “fiercely independent”, as Max guessed in his editorial on the [Festa della Repubblica](#).

The (real) legal problems

For a non-partisan legal scholar, the interest of the *Diciotti* case lies elsewhere. The personal liberty of 177 migrants has been confined for much longer than the time needed to complete the rescue operation. Therefore, the first question is whether the 10-day period of detention onboard inflicted upon the migrants is compatible with the guarantees provided by Article 5 EHCR and Article 13 of the Italian Constitution, which both require that any measure of administrative detention must be carried out in accordance with the law and be promptly reviewed by a judicial authority. The patent deficiencies of the conduct of the Italian Government in these respects make a condemnation before the Court of Strasbourg very plausible, in line with the ruling in the [Khlaifia](#) case, discussed also [here](#).

A second problem concerns the possible transfer of 20 rescued migrants to Albania, announced soon after the disembarkation in Catania. The Dublin III Regulation (No. 604/2013) sets the conditions and procedure under which an asylum applicant can be transferred to another Member State designated as responsible for processing the request. By contrast, the transfer to a non-EU country like Albania is not regulated by any norm of European or international law. A series of questions thus arise: How are the migrants to be transferred to Albania selected? What if the rescued migrants – mostly from Eritrea – want to apply for international protection in Italy: Can they be relocated in Albania without their consent? How can they challenge the transfer decision? What happens to them after their arrival? How are asylum seekers treated in Albania? Is the transfer possible even if there is no court or procedure to ascertain whether “there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants” in the non-EU State of destination – in which case Article 3 of the Dublin III regulation prevents the transfer (also) to a EU Member State?

A third issue can be related to the Interior Minister’s threat of bringing migrants back to Libya if the European partners refused to share the burden. Had such words been followed by facts, the Italian push-back operation would have openly violated the non-refoulement principle, as in the [Hirsi case](#). But another legal question would send a truly alarming message to Rome and the other European chancelleries. For how long the delegation of search and rescue (i.e. push-back) operations to the Libyan Coast Guard – in a Central Mediterranean now emptied by NGO ships and with the [Sophia mission in likely retreat](#) – will be sufficient to shield the Italian government from legal responsibility for aiding and assisting the former (see [here](#), [here](#) and [here](#))? Given the expanding notion of State jurisdiction (and responsibility) under international law, the European strategy of border externalization might become legally vulnerable.

Beyond the populist contradiction

The *Diciotti* case also illustrates the conundrum that *Lega* and *Movimento Cinque Stelle* are facing. For an anti-system government, both the unauthorized migrants and a divided Union are perfect targets to feed its consensus. Yet, geography suggests that Italy must cooperate with the rest of Europe in order to manage immigration from Africa, as Italy’s stay in the Schengen club is at stake. For populist movements, to recognize that the need for protection of their electorate can only be satisfied within Europe is an encounter with reality that takes time to digest. In the meantime, the mismatch between the instinctive need for a daily plebiscite, based on anti-Europeanism, and the more rational necessity of a long-term strategy, based on European solidarity, explains the government’s reluctant nationalism and the ambiguities of a negotiating style that evokes the image of a begging emperor.

However, this superficial contradiction should not hide the deeper one, which threatens the future of the European migration and asylum policy. Except for the Višegrad countries, all European partners declare themselves to be in favor of the principle of solidarity in the management of immigration. But the meaning that the parties attribute to the concept of solidarity is different. Macron and now also Merkel would like the burden-sharing to be essentially financial: The other European partners will provide Italy with the necessary resources, as they already do with Turkey, but Italy will still have to manage the migratory flows arriving from the sea, possibly through the creation of "controlled centers", as the conclusions of the European Council of last June suggest ([here, at § 6](#)).

The Italian position is understandably different. After years in which Italy has been the only European country to take seriously the legal obligation to save migrants in the Mediterranean and to accept them on its territory, the Italian government calls for a broader notion of "burden sharing" which involves also a *distribution of people* and, hence, it proposes to cut off the link between the country of first entry and the obligation to process asylum applications on which the Dublin system relies. At a time when Germany is trying to make the "first country of entry" rule [really binding](#), the Italian position can be hardly dismissed as unreasonable. But there is a serious risk that the current strategy of blackmailing Europe, reiterated in the *Diciotti* case, will end up compromising the solidity of Italian arguments and eroding the already narrow margins for negotiation in Brussels.

